

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of HONG D. NGUYEN and DEPARTMENT OF THE AIR FORCE,  
EGLIN AIR FORCE BASE, FL

*Docket No. 01-552; Oral Argument Held September 17, 2002;  
Issued February 28, 2003*

Appearances: *Marion Peck*, representative for appellant; *Catherine P. Carter, Esq.*, for the  
Director, Office of Workers' Compensation Programs.

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DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,  
MICHAEL E. GROOM,

The issue is whether appellant sustained an emotional condition in the performance of duty.

This is the second time this case has been before the Board. On June 30, 1992 appellant, a 30-year-old electronics engineer employed at Wright Patterson Air Force Base in Ohio, filed a claim for benefits based on an emotional condition. In November 1989 he applied for a transfer to a term or temporary position at Eglin Air Force Base in Florida. After appellant's transfer was approved, however, he alleged that he had not understood prior to accepting the new term appointment that he had lost the permanent career rights of his previous position. He stated that he began to experience anxiety and stress regarding his job security upon realizing that he no longer had a permanent status position and was therefore subject to termination upon the expiration of his term. Appellant also claimed that he began to experience hostility from management when he attempted to regain his permanent status. He further alleged that the employing establishment's failure to follow proper personnel procedures by failing to inform him of the consequences of his conversion and transfer constituted error.

By decisions dated September 24, 1992, May 27, 1993, July 5, 1994, July 12 and September 20, 1995, May 7, 1997 and May 27, 1998, the Office of Workers' Compensation Programs denied the claim. In a decision dated August 8, 2000, the Board set aside the May 27, 1998 Office decision,<sup>1</sup> on the grounds that appellant had submitted new and pertinent evidence relevant to the issue of whether he experienced emotional stress as a result of administrative error, thereby implicating a specific factor of federal employment. This evidence consisted of

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<sup>1</sup> Docket No. 98-2576 (issued August 8, 2000).

depositions from Joann Hutchison and Anita Wallace, appellant's supervisors. The supervisor's deposition supported appellant's contention that he was supposed to submit a signed written statement indicating that he understood the conditions of his conversion and transfer prior to accepting the new position offered by Ms. Hutchison in a December 6, 1989 letter, pursuant to Federal (FECA) Procedure Manual, Chapter 715, Subchapter 2.5, which outlines the procedures for employee conversions. However, appellant did not receive and sign such a statement until January 18, 1990, four days after the conversion became effective. The evidence included notes from Ms. Hutchison to Ms. Wallace, indicating that she and Ms. Wallace were both attempting, on appellant's behalf, to correct the procedural error made in effecting his conversion and transfer by obtaining an exemption to a division-wide hiring freeze and to reemploy him as a permanent appointee. The Board remanded the case for the Office to consider this evidence in a *de novo* merit decision.

By decision dated September 8, 2000, the Office found that appellant did not submit evidence sufficient to warrant modification of the previous Office decisions.

The Board finds that the case is not in posture for decision.

To establish that an emotional condition was sustained in the performance of duty there must be factual evidence identifying and corroborating employment factors or incidents alleged to have caused or contributed to the condition, medical evidence establishing that the employee has an emotional condition and rationalized medical opinion establishing that compensable employment factors are causally related to the claimed emotional condition.<sup>2</sup> There must be evidence that implicated acts of harassment or discrimination did, in fact, occur supported by specific, substantive, reliable and probative evidence.<sup>3</sup>

The first issue to be addressed is whether appellant has established any factors of employment that contributed to his alleged emotional condition or disability. Where the disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.<sup>4</sup> On the other hand, disability is not covered where it results from an employee's fear of a reduction-in-force, frustration from not being permitted to work in a particular environment or to hold a particular position or to secure a promotion. Disabling conditions resulting from an employee's feeling of job insecurity or the desire for a different job do not constitute a personal injury sustained while in the performance of duty within the meaning of the Act.<sup>5</sup>

The Board finds that appellant has established a compensable factor of employment. The evidence establishes that the employing establishment failed to inform appellant of the consequences of his transfer from the permanent status position at Wright Patterson Air Force

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<sup>2</sup> See *Debbie J. Hobbs*, 43 ECAB 135 (1991).

<sup>3</sup> See *Ruth C. Borden*, 43 ECAB 146 (1991).

<sup>4</sup> *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>5</sup> See *id.*

Base in Ohio, to the temporary position at Eglin Air Force Base in Florida; *i.e.*, that he would lose his permanent career status rights and would therefore be subject to termination upon the expiration of his term. The Board has found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.<sup>6</sup>

The depositions from appellant's supervisors, Ms. Hutchison and Ms. Wallace, clearly establish that, pursuant to the employing establishment's own procedures for employee conversions, appellant was to be notified and submit a signed, written statement indicating that he understood the conditions of his employment status conversion and transfer prior to accepting the position offered by Ms. Hutchison in her December 6, 1989 letter. The record indicates, however, that appellant did not receive or sign any such statement until January 18, 1990, four days after the conversion became effective. The evidence from Ms. Hutchison and Ms. Wallace establish that appropriate personnel procedures were not followed and, subsequently they attempted to correct the error made in effecting his conversion and transfer by obtaining an exemption to a division-wide hiring freeze and reemploy him as a permanent appointee. This evidence clearly establishes agency error on the part of the employing establishment in discharging its administrative functions, therefore establishing a compensable factor of employment.

Appellant's burden of proof is not discharged by the fact that he has established an employment factor which may give rise to a compensable disability under the Act. He also has the burden of submitting medical evidence to support his claim that the employing establishment's administrative error resulted in an employment-related emotional condition.<sup>7</sup> Appellant has submitted medical evidence which the Office has not reviewed. On remand the Office should consider the medical evidence and, if necessary, further develop the claim as appropriate. After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.<sup>8</sup>

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<sup>6</sup> See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

<sup>7</sup> *Chester R. Henderson*, 42 ECAB 352 (1991).

<sup>8</sup> Chairman Michael J. Walsh who participated at oral argument was no longer a member of the Board after January 10, 2003 as his appointment expired. He did not participate in the preparation of this decision.

The decision of the Office of Workers' Compensation Programs dated September 8, 2000 is set aside and the case is remanded for further action in accordance with this decision.

Dated, Washington, DC  
February 28, 2003

Alec J. Koromilas  
Chairman

Michael E. Groom  
Alternate Member